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Paul Harpur

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TIME TO BE HEARD: HOW ADVOCATES CAN USE THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES TO DRIVE CHANGE

Paul Harpur*

I. INTRODUCTION

People who use sign language to communicate have argued that they are a linguistic minority and not disabled.¹ Rather than being disabled, people in this group have argued that they simply speak a language different than others, such as Spanish or Russian. Labeling a person as disabled attracts negative historical baggage. For this reason, some scholars have argued for the term of “ableism” to replace the term “disability discrimination.”² Although these debates are extremely important, it is equally important to utilize all available tools to achieve social inclusion for all people regardless of their different abilities. This Article will demonstrate how one such tool can be used to benefit persons with disabilities. In particular, this Article will analyze how the norms and state acceptance of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) can be used by non-government organization (“NGO”) and disability person organization (“DPO”) advocates to drive change in their communities and achieve law reforms where appropriate.³

Persons with disabilities are the world’s largest minority group.⁴ Persons with disabilities have historically confronted systemic

* BBus (HRM), LLB (Hons), LLM, PhD, Attorney of Law, Post Doctorate Research fellow, University of Queensland, the TC Beirne School of Law. I would like to thank the participants at the Griffith University Socio-Legal Research Centre March 2010 Seminar and the participants at the Theorizing Normalcy and the Mundane Conference, Manchester, co-hosted by the University of Chester, Manchester Metropolitan University, Sheffield Hallam University, and the University of Iceland, May 2010, for the helpful comments on an earlier version of this Article.

¹ MAIRIAN CORKER, DEAF AND DISABLED, OR DEAFNESS DISABLED? TOWARD A HUMAN RIGHTS PERSPECTIVE 6 (1998) (discussing the debate between the label of linguistic minority and disabled); see also PADDY LADD, UNDERSTANDING DEAF CULTURE: IN SEARCH OF DEAFHOOD 14 (2003) (same).

² See, e.g., Paul Harpur, *Sexism and Racism, Why Not Ableism? Calling for a Cultural Shift in the Approach to Disability Discrimination*, 34 ALTERNATIVE L.J. 163 (2009).

³ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/500/79/PDF/N0650079.pdf?OpenElement>.

⁴ Int’l Convention on the Rights of Persons with Disabilities, *Some Facts About Persons with Disabilities*, U.N. at 1 (Aug. 14–25, 2006), <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf>.

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discrimination.⁵ The Preamble to the CRPD explains that the United Nations adopted this Convention based on twenty-five key facts including “the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities.”⁶ The World Bank estimates that persons with disabilities make up twenty percent of the world’s poorest people.⁷

There have been recent international and domestic commitments to improving the human rights of persons with disabilities. In 2006, the United Nations adopted the CRPD and in 2009 the United States ratified this convention.⁸ The rights of persons with disabilities have gained national attention as the result of the Obama administration’s express commitment to advancing the rights of persons with disabilities.⁹ The adoption of the CRPD by the United Nations and its ratification by the United States have substantially shifted the paradigm that guides domestic laws and policies.

Part II of this Article will analyze the paradigm shift inherent in the CRPD. Part II.A analyzes the development of disability policies through the welfare model, to the social model, and finally to the propounding of a human rights agenda. Part II.B then explores how the CRPD has embraced this human rights agenda and how its sweeping human rights agenda can change the lives of persons with disabilities. To emphasize the potential of the rights approach, Part II.C demonstrates what the change means for persons with disabilities exercising their right to work. Part III of this Article then builds upon the sweeping rights agenda to analyze what DPO advocates can do to facilitate the change. Part III.A considers the role of shadow reports and builds on comments of the current chairman of the international committee monitoring the implementation of the CRPD. Part III.B analyzes other steps advocates

⁵ See Michael Ashley Stein & William P. Alford, *Youngberg v. Romeo*, in 3 ENCYCLOPEDIA OF AMERICAN DISABILITY HISTORY 988, 988–89 (Susan Burch ed., 2009) (discussing the systemic discrimination confronted by persons with disabilities); see also BURTON BLATT, *EXODUS FROM PANDEMONIUM: HUMAN ABUSE AND A REFORMATION OF PUBLIC POLICY*, 16–18 (1970) (same); Paul Harpur, *Developments in Chinese Labour Laws: Enforcing People with Disabilities’ Right to Work?*, 2009 LAWASIA J. 26, (Austl) [hereinafter Harpur, *Chinese Labour Laws*] (same); Einat Hurvitz, *Disability Rights and United States Foreign Assistance Policy – A New Framework*, 18 AM. U. INT’L L. REV. 1189 (2003) (same).

⁶ CRPD, *supra* note 3, pmb., ¶ (t).

⁷ Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1203 (2007).

⁸ As of February 15, 2011, there were 147 state signatories and 98 ratifications to the CRPD. Latest Developments, UN ENABLE, <http://www.un.org/disabilities/>.

⁹ See *Disabilities*, WHITE HOUSE, <http://www.whitehouse.gov/issues/disabilities/> (last visited Sept. 1 2010).

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can take to create a climate of change. This Article then focuses on DPO capacity building.

II. HOW THE CRPD EMBRACES THE HUMAN RIGHTS PARADIGM

A. *From Welfare to Rights: Changes in the Models Guiding Laws and Policies*

Historically, society discounted persons with disabilities and regarded them as defective and in need of charity. This perspective was perpetuated through the so-called medical or welfare model.¹⁰ Under the medical model, persons with disabilities were viewed as being in some way different from the wider society. As a consequence, persons with disabilities fell outside mainstream society. This resulted in persons with disabilities being directed toward separate, parallel tracks of government policies. The policy track for the wider community targeted fully functional members of society and focused upon developing the potential of that group. The policy track for persons with disabilities regarded them as defective and focused on providing this group welfare and rehabilitation to cope in a society filled with barriers.¹¹ The separation resulted in persons with disabilities becoming outsiders to society. Persons with disabilities had inferior and separate education,¹² were largely restricted to work in sheltered workshops rather than in the private sector,¹³ and were systematically excluded from accessing public transport and exercising political rights.¹⁴ Simply put, disabled persons were generally regarded as second-class citizens.

Rather than attempting to address the systemic discrimination in society, policies that adhered to the medical model focused on solving “the problem [of misalignments between individuals and social practice]

¹⁰ Stein & Stein, *supra* note 7, at 1206.

¹¹ Lisa Waddington & Matthew Diller, *Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 241, 244 (Mary Lou Breslin & Silvia Yee eds., 2002) (analyzing whether the disagreement between the civil rights model and the social welfare/medical model can be resolved and whether a new model is necessary).

¹² See THOMAS HEHIR, *NEW DIRECTIONS IN SPECIAL EDUCATION: ELIMINATING ABLEISM IN POLICY AND PRACTICE* 5 (2005) (sharing two stories that highlight the abusive conditions endured by disabled children in residential schools).

¹³ See Michael Gill, *The Myth of Transition: Contractualizing Disability in the Sheltered Workshop*, 20 *DISABILITY & SOC'Y* 613, 615-17 (2005) (discussing the circumstances that restrict disabled workers to jobs that pay little and result in a type of lifelong servitude).

¹⁴ David Baker and Sarah Godwin, *All Aboard!: The Supreme Court of Canada Confirms That Canadians with Disabilities Have Substantive Equality Rights*, 71 *SASK. L. REV.* 39, 41-42 (2008) (discussing the routine exclusion of disabled persons from transportation systems).

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by realigning (eligible) individuals.”¹⁵ The idea was that persons with disabilities should be cured, rehabilitated, or fixed.¹⁶ In essence, the medical model regarded disabled persons’ impairments as the problem and, accordingly, laws and policies focused on training persons with disabilities to manage in a barrier-filled society. In other words, the medical model focused on teaching a person who required a walking frame how to navigate steps rather than requiring buildings to include lifts or ramps.

Following the passage of the Rehabilitation Act in 1973, advocates started to strongly promote the social model as an alternative to the medical model.¹⁷ The main thrust of the social model was that impairment should be defined separately from disability.¹⁸ Distinguishing between impairment and disability established that it was not an identified impairment but the structure of society that labeled individuals as disabled.¹⁹ More concretely, a person’s impairment did not make them disabled but society’s decision not to require building owners to install lifts or ramps did.

The move away from the medical model to the social model required “a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations upon certain groups or categories of people.”²⁰ Accordingly, the social model focuses upon dismantling socially constructed barriers

¹⁵ Anita Silvers, *Formal Justice, in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 85 (Anita Silvers et al. eds., 1998). Silvers demonstrates that what is deemed by society to be a dysfunction is often more accurately described as atypical, anomalous, or diverse modes of functioning or the product of an inhospitable physical or social environment. *Id.*

¹⁶ See TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS 29–53 (2006) (critiquing the medical and social models); Pamela Brandwein & Richard K. Scotch, *The Gender Analogy in the Disability Discrimination Literature*, 62 OHIO ST. L.J. 465, 466 (2001) (performing “a sociological examination of the academic legal literature on disability”).

¹⁷ See Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2006 & Supp. III 2009) (recognizing that society created barriers that disabled people with impairments). Although the limited scope of the Act meant that many barriers would remain in society to disable people, the shift to a focus on society’s conduct rather than the individual was a positive early step.

¹⁸ Paul Abberley, Paper Presented at University College Dublin: The Significance of Work for the Citizenship of Disabled People, 3 (Apr. 15, 1999), available at <http://www.leeds.ac.uk/disability-studies/archiveuk/Abberley/sigofwork.pdf>; see also COLIN BARNES, GEOFF MERCER & TOM SHAKESPEARE, EXPLORING DISABILITY: A SOCIOLOGICAL INTRODUCTION (1999); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990); MICHAEL OLIVER & COLIN BARNES, DISABLED PEOPLE AND SOCIAL POLICY: FROM EXCLUSION TO INCLUSION (1998); Vic Finkelstein, *The Social Model of Disability Repossessed*, COALITION, at 1 (Feb. 2002), available at <http://www.gmcdp.com/Social%20Model02.pdf>.

¹⁹ Waddington & Diller, *supra* note 11, at 280.

²⁰ MICHAEL OLIVER & BOB SAPEY, SOCIAL WORK WITH DISABLED PEOPLE 23 (1983).

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to full inclusion.²¹ Michael Oliver explains that the “core of the social model” aims for the ideal that “[i]t is society that has to change not individuals.”²² The social model therefore argued for anti-discrimination statutes and the development of universal design to advance the rights of persons with disabilities.²³

The adoption of the social model did not always result in equal treatment. Ani Satz observed that the fragmentation of policies caused by the social model and anti-discrimination agenda resulted in persons with disabilities having support structures that were created under the welfare model removed.²⁴ The removal of some of these welfare supports resulted in some persons with disabilities being disadvantaged. This resulted in Satz calling for a partial return to the welfare model. He proposed a blend of the social and welfare models to improve the realization of rights. While Satz looked to history for appropriate theoretical responses, other scholars have looked to the future to construct an approach that would remedy the problems with the social model.

Michael Ashley Stein and Penelope J.S. Stein have promoted a dynamic new theory that builds upon the social model and the capabilities approach.²⁵ Before analyzing the human rights paradigm, this Article will briefly explore the capabilities approach. The capabilities approach focuses upon agency and requires the state to offer support to persons with impairments. The capabilities approach also prohibits discriminatory conduct through anti-discrimination statutes.²⁶

²¹ Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 254 (2009) [hereinafter Lord & Stein, *Social Rights*].

²² MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 37 (1996).

²³ See CRPD, *supra* note 3, at art. 2 (“‘Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”).

²⁴ Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 560 (2008).

²⁵ See Stein & Stein, *supra* note 7, at 1203–06 (“[T]o be effective, both domestic and international disability rights must adopt a disability human rights paradigm. Such a framework combines the type of civil and political rights provided by antidiscrimination legislation (also called negative or first-generation rights) with the full spectrum of social, cultural, and economic measures (also called positive or second-generation rights) bestowed by many human rights treaties.”).

²⁶ MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) [hereinafter NUSSBAUM, FRONTIERS]; see also AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Amartya Sen, *Development as Capability Expansion*, in HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990s 41, 43–54 (Keith Griffin & John Knight eds., 1990).

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The capabilities theory holds that “all people are individually worthy of regard, autonomy, and self-fulfilment.”²⁷ To achieve the full potential of persons, Martha Nussbaum’s capability scheme posits ten capabilities which are essential to enable people to flourish. These ten capabilities consist of the following:

1. Life – The ability to live a full life span;
2. Bodily health – Having bodily health including reproductive health;
3. Bodily integrity – Having sufficient bodily integrity for independent movement and sovereignty;
4. Senses – Having senses, imagination, and thought;
5. Emotions – The ability to feel emotions;
6. Practical reason – The ability to exercise practical reason;
7. Affiliation – The ability to recognize and show concern for other people and to engage in various forms of social interaction;
8. Other species – The ability to recognize and interact with animals, plants, and the world of nature;
9. Play – The ability to enjoy play and recreation;
10. Control over one’s environment – Ability to exercise control over political and property affairs.²⁸

If a person cannot exercise the ten capabilities, the capabilities theory provides that a person is not able to enjoy a “fully human life.”²⁹ As a consequence, Nussbaum’s capability scheme appears to exclude a range of people who suffer impairments because they do not have sufficient abilities. Stein and Stein criticize the requirement that people are required to reach species-typical functioning levels to benefit from the capabilities approach.³⁰ The disability human rights paradigm proposed by Stein and Stein is not limited by the limitations of the capabilities model and extends the rights contained in the social model.

The social model focuses upon negative or first generation rights. The resulting anti-discrimination laws have failed to adequately protect the positive or second generation rights of persons with disabilities. Without the existence of positive rights, many persons with disabilities are unable to take advantage of the opportunities provided by the existence of negative rights. The human rights paradigm recognizes the role society plays in constructing disability through creating barriers to

²⁷ Stein & Stein, *supra* note 7, at 1216.

²⁸ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78–80 (2000).

²⁹ NUSSBAUM, *FRONTIERS*, *supra* note 26, at 181.

³⁰ Stein & Stein, *supra* note 7, at 1231.

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inclusion. The human rights paradigm then combines the anti-discrimination protections that the social model created with rights found under human rights regimes. In other words, the human rights paradigm embraces universal design but recognizes that universal design alone will often not ensure equality. There is past injustice and some persons have impairments with ongoing needs for assistance. Social policies should focus upon substantive equality and ensure all persons can exercise their human rights regardless of their levels of abilities.

As a consequence, the human rights paradigm creates a holistic model which continues to protect negative rights while ensuring that rights generally exogenous to civil rights laws are also protected. Through this model, Stein and Stein aim to provide guidance on how to achieve “equal opportunity rather than ‘merely’ equal treatment.”³¹ The equal opportunity outcome of the human rights paradigm is achieved by enabling all persons to fulfill their potential regardless of their abilities. The paradigm operates from the premise that every person has the right to utilize his or her talents. The contribution that a person can make to society should not guide the extent to which that person is provided the opportunity to exercise his or her rights.

This section has explored the development of the theories that have guided law and policy decisions. The focus of these different models results in significant substantive differences in the lives of persons with disabilities. The next section analyzes how these models are reflected in existing legal instruments.

B. The CRPD and Disability Rights Models

The medical model, social model, and human rights paradigm have been embraced by different legal instruments. The Americans with Disabilities Act (“ADA”) and the Rehabilitation Act are civil rights statutes that are heavily based upon ideas of equality drawn from the social model.³² This anti-discrimination approach appears in statutes across the globe.³³ In comparison to the social model, the focus in the human rights paradigm on respecting persons’ dignity and the indefeasibility of human rights has limited legislative support. Indeed,

³¹ *Id.* at 1206.

³² See Rehabilitation Act of 1973, 29 U.S.C. § 701 (2006 & Supp. III 2009); Americans with Disabilities Act, 42 U.S.C. § 12111(8) (2006).

³³ Jared D. Cantor, Note, *Defining Disabled: Exporting the ADA to Europe and the Social Model of Disability*, 24 CONN. J. INT’L L. 399, 409 (2009). For examples of statutes that adopt this approach see the *Disability Discrimination Act 1992* (Cth) (Austl.); *Disability Discrimination Act, 1995*, c. 50 (U.K.); *Equality Act, 2010*, c. 15 (U.K.).

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this paradigm has only recently been embraced by the United Nations in the CRPD and by the United States when it ratified the convention.

The CRPD expressly embraces the social model. The Preamble to the CRPD explains that the convention “[r]ecogniz[es] that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”³⁴ The CRPD, however, goes much further than the social model. The social model focuses upon universal design and the removal of barriers largely through civil rights statutes. The social model does not focus on redressing the problems caused by past discrimination or addressing the problem where persons with impairments could not fully function even if universal design were embraced. For example, even if all architectural barriers were removed, a person with quadriplegia would require an electric wheelchair and additional medical support, and a person without eyesight would require training and a mobility aid such as a guide dog or white cane. The social model advances disability rights substantially from the medical model but fails to ensure all persons with disabilities can exercise their human rights. The human rights paradigm takes this next step and creates a governing policy framework that ensures persons with disabilities can exercise all their human rights.

The rights protected in the CRPD are extensive. As a sweeping human rights convention, the CRPD posits an extremely broad human rights agenda. The CRPD preamble builds upon existing human rights conventions including the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights, among others.³⁵ In

³⁴ CRPD, *supra* note 3, pmb., ¶ (e).

³⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) (entered into force July 1, 2003); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 A(XX), U.N. Doc. A/RES/2106A(XX) (Dec. 21, 1965) (entered into force on Jan. 4, 1969); Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217A(III) (Dec. 10, 1948) [hereinafter UDHR].

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addition, the preamble focuses on achieving “[e]qualization of [o]pportunities,” mainstreaming disability protections for persons requiring intensive support or less support, actively involving persons with disabilities in policy developments, and recognizing that action is required to redress past discrimination that has resulted in poverty.³⁶ Articles One and Two of the CRPD are introductory. The CRPD then posits rights of universal application in Articles Three through Nine, establishes substantive rights in Articles Ten through Thirty, develops implementation and monitoring schemes in Articles Thirty-One through Forty, and explains how the CRPD should be governed in Articles Forty-One through Fifty.

The CRPD is a general human rights instrument and, accordingly, addresses rights across the full gamut of human activities. The CRPD protects the rights to access roads, transportation, information technologies, and communications;³⁷ the right to life;³⁸ the right to protection and safety in situations of risk, including situations of armed conflict, humanitarian emergencies, and the occurrence of natural disasters;³⁹ the right to equal recognition before the law and the support necessary to exercise this right;⁴⁰ the right to effective access to justice on an equal basis with others including accommodations where required;⁴¹ the right to liberty and security of person;⁴² the right to be free from “torture or cruel, inhuman or degrading treatment or punishment”;⁴³ the right to be free from “exploitation, violence and abuse”;⁴⁴ the right to respect of physical and mental integrity;⁴⁵ the rights to liberty of movement, to freedom to choose residence, and to a nationality;⁴⁶ the right to live in the community with choices equal to others and to have the state implement effective and appropriate measures to facilitate full enjoyment of this right;⁴⁷ the right to personal mobility and to have state-provided support to achieve this end, including the provision of mobility aids and training;⁴⁸ the right to freedom of expression and opinion, including the freedom to seek, receive, and impart information and ideas

³⁶ CRPD, *supra* note 3, pmb., ¶¶ (f), (g), (i), (o), (p), (t), (v).

³⁷ *Id.* at art. 9.

³⁸ *Id.* at art. 10.

³⁹ *Id.* at art. 11.

⁴⁰ *Id.* at art. 12.

⁴¹ *Id.* at art. 13.

⁴² *Id.* at art. 14.

⁴³ *Id.* at art. 15.

⁴⁴ *Id.* at art. 16.

⁴⁵ *Id.* at art. 17.

⁴⁶ *Id.* at art. 18.

⁴⁷ *Id.* at art. 19.

⁴⁸ *Id.* at art. 20.

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on an equal basis with others and through all forms of communication of one's choice;⁴⁹ the right of privacy, regardless of place of residence or living arrangements;⁵⁰ the right to be free from discrimination in all matters relating to marriage, family, parenthood, and relationships;⁵¹ the right to education, including life-long learning and accommodations to exercise this right;⁵² the right to the enjoyment of the "highest attainable standard of health without discrimination";⁵³ the right to state-sponsored "comprehensive habilitation and rehabilitation services and programmes";⁵⁴ the right to work, and to equal remunerations;⁵⁵ the right to an "[a]dequate standard of living and social protection";⁵⁶ the right to "[p]articipation in political and public life";⁵⁷ and the right to "[p]articipation in cultural life, recreation, leisure and sport."⁵⁸

The human rights agenda of the CRPD alters the governing paradigm in a profound way. Lord and Stein explain that

[t]he CRPD advances social rights in a way that may profoundly affect the development of emergent social rights jurisprudence and advance human rights advocacy. Its comprehensive rights catalog allows direct invocation of social rights claims, eliminating the need to fit such claims within the framework of more established civil or political rights.⁵⁹

As an international convention, state signatories are required to comply with the provisions of the CRPD, allowing it to drive domestic law and policy reforms. The CRPD requires states to

undertake to adopt immediate, effective, and appropriate measures:

(a) To raise awareness throughout society, including at the family level, regarding persons with

⁴⁹ *Id.* at art. 21.

⁵⁰ *Id.* at art. 22.

⁵¹ *Id.* at art. 23.

⁵² *Id.* at art. 24.

⁵³ *Id.* at art. 25.

⁵⁴ *Id.* at art. 26.

⁵⁵ *Id.* at art. 27. The right to work includes rights to non-discriminatory employment, the provision of accommodations, state-sponsored support, support for self-employment and further education, measures to promote the employment of persons with disabilities, and return to work programs.

⁵⁶ *Id.* at art. 28.

⁵⁷ *Id.* at art. 29.

⁵⁸ *Id.* at art. 30.

⁵⁹ Lord & Stein, *Social Rights*, *supra* note 21, at 251 (footnote omitted).

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disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.⁶⁰

Effectively, the CRPD requires states to take positive action to promote a sweeping disability-rights-based agenda. The interventions are not just limited to changing laws, but include wider community education and the promotion of DPOs as representative organizations.⁶¹

C. *From the Social Model to the Human Rights Paradigm: The Right to Work*

To demonstrate how the CRPD has shifted the obligations on states, this Article will analyze what the introduction of the human rights paradigm means for laws and policies governing one right: the right to work. Under international human rights law, all people have a right to work. This has always notionally included persons with disabilities. Despite this formal protection, this right has often not translated into substantive enjoyment of the right to work.⁶² The Universal Declaration of Human Rights ("UDHR") provides that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."⁶³ Article Six, section

⁶⁰ CRPD, *supra* note 3, at art. 8(1).

⁶¹ *Id.* at art. 29.

⁶² Many authors have written on the low employment rate of persons with disabilities. See, e.g., Dan Goodley & Ghassem Norouzi, *Enabling Futures for People with Learning Difficulties? Exploring Employment Realities Behind the Policy Rhetoric*, in *WORKING FUTURES? DISABLED PEOPLE, POLICY AND SOCIAL INCLUSION* 219, 219-29 (Alan Roulstone & Colin Barnes eds., 2005); Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 *BERKELEY J. EMP. & LAB. L.* 527 (2004) (reviewing *THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE* (David C. Stapleton & Richard V. Burkhauser eds., 2003)); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 *FLA. ST. U. L. REV.* 313 (2007); John R. Autry, Note, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"*, 79 *CHI.-KENT L. REV.* 665 (2004).

⁶³ UDHR, *supra* note 35, at art. 23. Despite being a declaration, the UDHR has such a wide acceptance by nations that it has been contended that most rights in the UDHR constitute customary law. See Penelope Mathew, *Human Rights*, in *PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE* 258, 268-69 (Sam Blay, Ryszard Piotrowicz & Martin Tsamenyi eds., 2d ed. 2005); Scott L. Porter, *The Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold "States" Party to the War in Bosnia-Herzegovina Legally*

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one of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") clearly supports Article Twenty-Three of the UDHR through the following provision: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."⁶⁴

The right to work generally has substantial academic and state support. Aleah Borghard has argued that the right to work has sufficient acceptance as constituting a human right: "Despite the struggles with implementation and enforcement, the international community now publicly recognizes economic rights as human rights, and the economic right to work is directly applicable to the struggle."⁶⁵ As Rhoda Howard and Jack Donnelly observe, without the right to work being realized, no social or economic rights can be realized, as a person without work is unable to participate in the economy.⁶⁶ More broadly, Philip Alston claims that if economic rights are not realized, people will be denied many of the rights in the UDHR.⁶⁷

The difficulty for persons with disabilities with the right to work included in the UDHR and ICESCR is that it is unclear precisely what states need to do to discharge this right. The phrase "just and favourable conditions of work"⁶⁸ could include the right to fair pay,⁶⁹ the right to not be unemployed,⁷⁰ the right to use work to alleviate poverty,⁷¹ the right to employment for immigrants,⁷² and the right to decent work for people

Accountable in the International Court of Justice?, 3 TULSA J. COMP. & INT'L L. 141, 152-55 (1995) (making the argument that the Declaration is a part of customary international law).

⁶⁴ ICESCR, *supra* note 35, at art. 6(1).

⁶⁵ Aleah Borghard, Note, *Free Trade, Economic Rights, and Displaced Workers: It Works if You Work It*, 32 BROOK. J. INT'L L. 161, 182 (2006).

⁶⁶ Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801, 817 (1986).

⁶⁷ Philip Alston, *Making Economic and Social Rights Count: A Strategy for the Future*, 68 POL. Q. 188, (1997).

⁶⁸ UDHR, *supra* note 35, at art. 23.

⁶⁹ See Sally Cowling, William F. Mitchell & Martin J. Watts, *The Right to Work Versus the Right to Income*, 2 INT'L J. ENV'T, WORKPLACE & EMP. 89 (2006); Philip Harvey, *The Right to Work and Basic Income Guarantees: Competing or Complementary Goals?*, 2 RUTGERS J.L. & URB. POL'Y 8 (2005).

⁷⁰ See generally John Burgess & William Mitchell, *Unemployment, Human Rights and a Full Employment Policy in Australia*, 4 AUSTL. J. HUM. RTS. 76, 76 (1998) (arguing that "an empirically based, experiential notion of human rights suggests that governments are violating the right to work by refusing to eliminate unemployment via appropriate use of budget deficits").

⁷¹ See generally Nsongurua J. Udombana, *Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 CORNELL INT'L L.J. 181 (2006).

⁷² See Borghard, *supra* note 65.

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with disabilities.⁷³ The right to work therefore could be said to contain a number of sub-rights. The challenge under the pre-CRPD human rights regime was defining precisely what sub-rights applied and how all these rights were to be implemented. In the absence of certainty, it was arguably possible to adopt an approach that maximized or minimized the enjoyment of rights.

Under the right to work prior to the CRPD, states could interpret this right through the medical model, the social model, or the human rights paradigm. The international instruments provided very little guidance on how to realize this right. Considering the UDHR and the ICESCR were created in the 1940s when the medical model was the governing paradigm, it is not surprising that the medical model was used to interpret these rights. It was not until the social model replaced the medical model that states began to take concrete steps to provide workplace protections. In the United States, for example, the Rehabilitation Act was not enacted until 1973 and the ADA was not enacted until 1990. Both of these enactments came decades after the UDHR and the ICESCR, and both of these enactments adopted a civil rights model focusing upon negative rights.

The uncertainty about what the right to work means for persons with disabilities has been substantially redressed by the CRPD. Unlike earlier human rights conventions, the CRPD is a human rights convention that specifically deals with the issues concerning persons with disabilities. Accordingly, Article Twenty-Seven of the CRPD provides significant detail on what states must do to ensure that persons with disabilities can enjoy their right to work. Article Twenty-Seven states:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

⁷³ See generally Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities* (Int'l Labour Org., Working Paper No. 14, 2003), <http://www.ilo.org/public/english/region/ampro/cinterfor/news/rightto.pdf>.

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(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.⁷⁴

⁷⁴ CRPD, *supra* note 3, at art. 27.

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Article Twenty-Seven expressly provides that states have positive and negative obligations to ensure persons with disabilities the right to work. The details in this Article provide a high degree of clarity about what states must to do to ensure this right. The change from the social model to the human rights paradigm is clear through the wording of the CRPD. This shift will require law and policy makers to substantially alter the accepted wisdom and governing approach when dealing with issues affecting persons with disabilities.

This section has analyzed how the CRPD has substantially increased the clarity and protection of the right to work for persons with disabilities. There is often a gap between laws on the books and laws in practice. The next part will explore how disability rights advocates can use the momentum of the CRPD to facilitate the change to the human rights paradigm.

III. USING THE CRPD AS AN AGENT FOR ADVANCING DISABILITY RIGHTS POLICIES

Dan Goodley has emphasized that the social model encourages disability rights advocates to theorize disability and its associated concomitant phenomena.⁷⁵ To achieve this end, Goodley argues, “[t]he social model is a philosophical and political stance from which a whole host of social theories and forms of activism can and should be developed.”⁷⁶ One theory that emerged from the social model is a human rights approach, which has found expression in the CRPD. How then can disability rights advocates advance the compliance project and disability theories following the CRPD?

A. *Shadow Reports to the CRPD Committee*

Similar to most international human rights conventions, the CRPD involves state reporting and an oversight committee.⁷⁷ This committee is created under Article Thirty-Four of the CRPD and is referred to as the United Nations Committee on the Rights of Persons with Disabilities (“Committee on the CRPD”). The inaugural members of the Committee on the CRPD were elected by states parties on November 3, 2008.⁷⁸

CRPD Article Thirty-Five requires states parties to submit periodic comprehensive reports on measures taken to give effect to the CRPD to

⁷⁵ Dan Goodley, *Who Is Disabled? Exploring the Scope of the Social Model of Disability*, in *DISABLING BARRIERS—ENABLING ENVIRONMENTS* 118 (John Swain et al. eds., 2d ed. 2004).

⁷⁶ *Id.* at 119.

⁷⁷ CRPD, *supra* note 3, at arts. 33–36.

⁷⁸ *Id.* at art. 4(4).

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the Committee on the CRPD. Article Thirty-Six charges the Committee on the CRPD to consider state reports and can make such suggestions and general recommendations on the report as the Committee considers appropriate. The state reports will be made available to other states parties by the United Nations and domestically within states parties by the state itself.⁷⁹

The perceptions of University of Sydney Professor Ron McCullum AO carry particular weight as he is the 2010 Chair of the Committee on the CRPD. Professor McCallum has commented:

It has always seemed to me that while the CRPD Committee has an important role to play, the success of the CRPD will depend much more on the manner in which ratifying countries both monitor and implement the CRPD. If article 33 is able to encourage these activities in states parties, then it will have played a crucial role in grounding the CRPD into the policies, laws and customs of ratifying nations.⁸⁰

In addition to state reports, Article Thirty-Three, section four requires states to involve DPOs fully in the monitoring process. The requirement to interact with DPOs provides an opportunity to ensure that the voices of persons with disabilities are heard by government. The challenge is for DPOs to maximize this new political significance by achieving positive results on the ground.

Civil society and academics have often used international human rights conventions to judge state conduct. This can take place through shadow reports, as anticipated by CRPD Article Thirty-Three, section four, or through other publications. Articles Four and Five of the CRPD require states to alter laws and policies if there is noncompliance. Civil society and academics can therefore compare states' conduct against their CRPD obligations to ascertain their level of compliance and to call for reforms where required. One of the earliest examples of this was published by the National Council on Disability in a report co-authored by Michael Ashley Stein and Michael Waterstone.⁸¹ In this work, Stein

⁷⁹ *Id.* at art. 36(3)–(4).

⁸⁰ Ron McCullum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* § 4.2 (Sydney Law Sch., Research Paper No. 10/3, 2010), available at <http://ssrn.com/abstract=1563883>.

⁸¹ NAT'L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) (May 12, 2008), available at

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and Waterstone briefly analyzed United States laws, judgments, and academic commentary to find the gaps with the current regulatory framework. Stein and Waterstone observed that the United States unsuccessfully adopted an anti-discrimination approach to protecting the rights of persons with disabilities. Waterstone has subsequently recommended reforms to remedy some of these contradictions.⁸² The gaps identified in this and other critiques have led scholars to strongly criticize the current regulatory structure and to recommend concrete reforms.⁸³

Beyond the United States, the CRPD has stimulated debate across the globe. The CRPD has been used to analyze how Australian laws protect persons with disabilities that use service dogs;⁸⁴ to analyze how Australian laws protect access to education of students with print disabilities;⁸⁵ to expose human rights abuses in Cambodia;⁸⁶ to critique Canadian mental disability laws;⁸⁷ to analyze advances in Chinese disability laws;⁸⁸ to analyze German education policies;⁸⁹ to critique the

http://www.ncd.gov/newsroom/publications/2008/pdf/ncd_crp_analysis.pdf (co-authored by Michael Stein and Michael Waterstone).

⁸² See generally Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1081 (2010) (arguing that federal laws and programs that regulate veterans with disabilities demonstrate the limitations with the ADA and “that a more coherent policy is possible”). “Federal employment policy for veterans with disabilities is more integrated and encourages workforce participation through both antidiscrimination law and social welfare policies.” *Id.*

⁸³ See Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008); James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1 (2005); Peter Blanck et al., *Empirical Study of the Americans with Disabilities Act*, in *Assessing the Employment Provisions of the Americans with Disabilities Act* (BBI Working Paper (2009)).

⁸⁴ See Paul Harpur, *The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?*, 29 U. TAS. L. REV. 1, 49–77 (2010) (Austl.).

⁸⁵ See Paul Harpur, *Ensuring Equality in Education: How Australian Laws Are Leaving Students with Print Disabilities Behind*, 15 MEDIA & ARTS L. REV. 70 (2010); Nicolas Suzor, Paul Harpur & Dylan Thampapillai, *Digital Copyright and Disability Discrimination: From Braille Books to Bookshare*, 13 MEDIA & ARTS L. REV. 1 (2008) (detailing background information on the problem).

⁸⁶ See Ulrike Buschbacher Connelly, *Disability Rights in Cambodia: Using the Convention on the Rights of People with Disabilities to Expose Human Rights Violations*, 18 PAC. RIM L. & POL’Y J. 123 (2009).

⁸⁷ See H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139, 161 (2009).

⁸⁸ See Harpur, *Chinese Labour Laws*, *supra* note 5; Eric G. Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China*, 34 SYRACUSE J. INT’L L. & COM. 517 (2007).

⁸⁹ See S. Ellger-Rüttgardt, *Convention on the Rights of Persons with Disabilities and Its Challenges to German Education Policy*, 48 REHABILITATION 369, 369 (2009).

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development of anti-discrimination laws in South Pacific island states;⁹⁰ to question Vietnamese laws protecting people with hearing impairments;⁹¹ and to provide guidance for World Bank policy developments.⁹² Although using the CRPD to critique existing regulatory frameworks is a useful endeavour, can the adoption of the CRPD and the dynamic of change created be utilized outside academia?

B. *How Can DPOs Create a Climate of Change?*

Academic greats such as Professors Peter Blanck, Gerard Quinn, Michael Ashley Stein, and Professor Waterstone have written on how to advance the disability rights agenda following the adoption of the CRPD.

Peter Blanck is the Chairman of the Burton Blatt Institute, an “organization to advance civic, economic, and social participation of persons with disabilities in a global society.”⁹³ Professor Blanck also holds the prestigious rank of University Professor at Syracuse University and has written over two hundred publications on the rights of persons with disabilities. This massive contribution to the disability rights movement continues to adapt and challenge barriers to persons with disabilities.

In light of the new type of disability politics created by the CRPD across the world, Eve Hill and Blanck recognize the current challenge to be ensuring implementation of the CRPD: “The implementation of the [CRPD] will succeed or fail depending on whether it is implemented as merely a technical standard, or recognized as a roadmap for transformation.”⁹⁴

Ensuring that persons with disabilities can gain economic self-sufficiency and can participate fully in the wider community will require the consideration of strategies related to educational support, economic

⁹⁰ See Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, 37 N. KY. L. REV. 363 (2010).

⁹¹ See Michael Schwartz, *Deafness in Vietnam: Will the United Nations Convention on the Rights of Persons with Disabilities Make a Difference?*, 34 SYRACUSE J. INT’L L. & COM. 483 (2007).

⁹² See KATHERINE GUERNSEY, MARCO NICOLI & ALBERTO NINIO, WORLD BANK, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ITS IMPLEMENTATION AND RELEVANCE FOR THE WORLD BANK, (June 2007), available at <http://hpod.pmhclients.com/pdf/ConventionImplications.pdf>.

⁹³ About Burton Blatt Institute (BBI), BURTON BLATT INST., <http://bbi.syr.edu/aboutbbi/> (last visited Nov. 5, 2010).

⁹⁴ Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and “The Right to Live in the World,”* 15 TEX. J. C.L. & C.R. 1, 29–30 (2009).

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policy reforms, and government-aided savings and micro loan programs.⁹⁵ Blanck has concluded that

[a]s long as disability is viewed as a problem to cure or as an incapacity to participate in the labor force, and not tied to rights and justice issues, the potential for individuals with disabilities to accumulate assets and the right to live in the world will be stymied. The longer term solution is to build links across education, economic development, community participation, and positive attitudes about disability in the United States and globally.⁹⁶

Achieving these substantial changes will require persons with disabilities to become more active in politics and have their voices heard.⁹⁷

Professor Gerard Quinn is the Director of the Centre for Disability Law and Policy at the National University of Ireland Galway School of Law.⁹⁸ Professor Quinn has substantial expertise on the role international agreements on disability rights have upon domestic legal systems.⁹⁹ In relation to the CRPD, Quinn has observed that the adoption of the CRPD by the United Nations and its rapid ratification has created a “dynamic of change.”¹⁰⁰ Quinn has argued that “the real

⁹⁵ See Peter Blanck, “The Right to Live in the World”: *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 400 (2008).

⁹⁶ *Id.* (footnote omitted).

⁹⁷ See LISA SCHUR, DOUGLAS KRUSE & PETER BLANCK, ARE PEOPLE WITH DISABILITIES SIDELINED OR MAINSTREAMED? ECONOMIC, POLITICAL, AND SOCIAL REALITIES (forthcoming 2011).

⁹⁸ Prof. Gerard Quinn, NUI GALWAY, http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html (last visited Nov. 5, 2010).

⁹⁹ For examples of Professor Quinn’s work, see Gerard Quinn, *Poverty, Invisibility and Disability: The Liberating Potential of Economic, Social and Cultural Rights*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT (G. van Buren ed., 2008); Gerard Quinn, *Disability Discrimination Law in the European Union*, in EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 231 (Helen Meenan ed., 2007); Gerard Quinn, *Closing: Next Steps – Towards a United Nations Treaty on the Rights of Persons with Disabilities*, in DISABILITY RIGHTS 519 (Peter Blanck ed., 2005); Gerard Quinn, HPOD Conference at Harvard Law School: Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD (Feb. 20, 2010) (transcript available at http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html).

¹⁰⁰ Gerard Quinn, *International Impact of the United Nations Convention the Rights of Persons with Disabilities – A New Engine of Reform*, (Jacobus tenBroek Disability Law Symposium, Baltimore, Maryland, April 17, 2009), available at <http://www.nuigalway.ie/cdlp/documents/publications/NFB%20paper%20final.pdf>; see also Gerard Quinn, *Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH

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added-value of the convention lies in its ability to trigger a *new kind of disability politics worldwide*.¹⁰¹ The CRPD has posited a new international norm for government policies by replacing the medical and social models with a human rights paradigm. The existence of a new international norm makes possible socialization and acculturation of law and policy makers around the world who can establish a new orthodoxy that embraces the social model.¹⁰² To achieve this change, Quinn argues for institutional champions to be established in states to drive change at the local level.¹⁰³

Professor Michael Ashley Stein is the Executive Director of the Harvard Law School Project on Disability (“HPOD”) and the Cabell Research Professor at the William & Mary School of Law. Stein has a strong connection with the CRPD, as he had a prominent role in its drafting.¹⁰⁴ Stein has worked with other leading scholars to use the CRPD as a launching platform to achieve substantive changes. One of the most traditional roles for a convention is to provide a backdrop against which state conduct can be judged. As discussed earlier, Stein rapidly utilized the CRPD in this way through publishing, with Professor Waterstone, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities*.

The transformation potential inherent in the CRPD will not be achieved through state conduct alone. Stein and Stein argue that realization of the human rights paradigm will require state intervention and active advocacy by DPOs and their members: “The disability human rights paradigm applies to both the process and outcome of human rights. It necessitates the participation of people with disabilities (along with other stakeholders) in the process of societal reconstruction so that they may claim their rights.”¹⁰⁵ Elsewhere Stein argued, with Dr. Janet Lord, that to achieve the social change, potential advocates must

DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 215 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

¹⁰¹ Quinn, *International Impact*, *supra* note 100.

¹⁰² See Gerard Quinn, Keynote Address at the Conference of States Parties to the UN Convention on the Rights of Persons with Disabilities: Implementing the UN Convention on the Rights of Persons with Disabilities—The Institutional Architecture for Change, (Oct. 31, 2008); Gerard Quinn, Keynote Address at the Swedish Presidency of the Council of Europe Conference on Disability: The UN Convention on the Rights of Persons with Disabilities as an Engine of Law Reform (Oct. 30, 2008).

¹⁰³ Gerard Quinn, *The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability*, 15 TEX. J. C.L. & C.R. 33, 40 (2009).

¹⁰⁴ Michael Stein, CURRICULUM VITAE, <http://hpod.org/pdf/stein.pdf> (last visited Nov. 1, 2010).

¹⁰⁵ Stein & Stein, *supra* note 7, at 1240.

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engage in a three-prong comprehensive human rights practice.¹⁰⁶ This approach must encompass a focus upon law reforms, strategically use litigation to create judge-made law and to ensure laws are enforced, and

employ a range of other approaches and techniques that are contemplated by a full and integrated reading of the CRPD. These include, *inter alia*, the familiar techniques of lawmaking and policymaking as well as strategies implementing the inclusive development mandate of the Convention, facilitating the expressive value of the CRPD through education and empowerment at the individual and community level, strengthening the organizational and advocacy capacity of DPOs, and forging strong links among and beyond the disability community and [national human rights institutions].¹⁰⁷

HPOD, under the executive directorship of Professor Michael Stein and chairmanship of Professor William Alford, has argued that “[a]n informed civil society is vital to promoting, implementing, and monitoring the [CRPD].”¹⁰⁸ To assist in the role of empowering DPOs, HPOD has created a range of publications to inform and advise civil society how to advocate.¹⁰⁹

This Part has analyzed how leading scholars have proposed advancing the disability rights cause following the adoption of the CRPD. Overall, these scholars indicate that the CRPD has the potential to alter disability rights politics worldwide. To realize this potential, these scholars have recommended that the CRPD be used to critique laws and policies against the new human rights framework. In addition

¹⁰⁶ Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United National Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 467 (2008) [hereinafter Lord & Stein, *Domestic Incorporation*].

¹⁰⁷ *Id.*

¹⁰⁸ *Publications*, HARV. L. SCH. PROJECT ON DISABILITY, <http://www.hpod.org/publications> (last visited Nov. 4, 2010).

¹⁰⁹ *Human Rights Training Materials*, HARV. L. SCH. PROJECT ON DISABILITY, <http://www.hpod.org/publications/human-rights-training> (last visited Nov. 5, 2010). The HPOD publications include: HARV. PROJECT ON DISABILITY, *CHANGE YOUR LIFE WITH HUMAN RIGHTS: A SELF-ADVOCACY BOOK FOR PEOPLE WITH DISABILITIES* (2008), available at http://hpod.pmhclients.com/pdf/Change_Your_Life_With_Human_Rights.pdf; HARV. PROJECT ON DISABILITY, *WE HAVE HUMAN RIGHTS: A HUMAN RIGHTS HANDBOOK FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES* (2008), available at <http://hpod.pmhclients.com/pdf/we-have-human-rights.pdf>; JANET E. LORD ET AL., UNIV. OF MINN. HUMAN RIGHTS RES. CTR., *HUMAN RIGHTS. YES! ACTION AND ADVOCACY ON THE RIGHTS OF PERSONS WITH DISABILITIES* (Nancy Flowers ed., 2007), available at <http://www.hpod.org/pdf/HumanRightsYes.pdf>.

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to such critiques, it is critical that civil society be empowered across the globe to utilize the rights posited in the CRPD. This advocacy can be through rallying for law or policy reforms, challenging breaches in domestic legal systems, or utilizing the appeal processes under the Optional Protocol to the CRPD.

C. *How to Empower Civil Society*

This Article has identified four key avenues through which advocates can advance the rights in the CRPD: calling for law reforms; reporting on variances between state conduct and obligations under the CRPD; initiating strategic litigation; and developing and enhancing the capacity of DPOs. The potential of these avenues all depend upon the capacity of DPOs to engage in advocacy. The importance of DPOs is reflected in the drafting of the CRPD. When the CRPD was being developed, DPOs had an extremely active role. These organizations felt they had been let down by the existing human rights regime and attempted to ensure the domestic incorporation of the CRPD “would evolve beyond current human rights practice toward a broader transformative vision.”¹¹⁰ Accordingly, this part of the Article will focus upon possible avenues to enhance the capacity of DPOs to advocate for the rights of people with different abilities.

There are numerous steps that DPOs could engage in to improve their capacity. Professor Edwards has identified and analyzed the attributes shared by successful human rights NGOs.¹¹¹ Human rights NGOs include all NGOs that advocate for human rights. Accordingly, DPOs are just one form of human rights NGOs.

In Part III of his paper, Edwards identified and analyzed the ten characteristics of successful human rights NGOs. According to Edwards, the following ten characteristics are the most critical for human rights NGOs:

¹¹⁰ Lord & Stein, *Domestic Incorporation*, *supra* note 106, at 455; *see also* U.N. Secretary-General, Secretary-General Hails Adoption of Landmark Convention on Rights of People with Disabilities, U.N. Press Release SG/SM/10797 (Dec. 13, 2006), *available at* <http://www.law.washington.edu/wlr/notes/83washrev449n24a.pdf> (stating that once adopted, signed, and ratified, the Convention “will have an impact on national laws that will transform how people with disabilities can live their lives”); *Lauding Disability Convention as ‘Dawn of a New Era,’ UN Urges Speedy Ratification*, UN NEWS CENTRE (Dec. 13, 2006), <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab>.

¹¹¹ George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 18 MICH. ST. J. INT’L L. 165 (2010).

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- “Have a Clear Mission to Promote and Protect Human Rights, and Be Result-Oriented”
- “Adhere to Human Rights Principles”
- “Be Legally Organized & . . . Comply With Law”
- “Be Independent & Non-Partisan”
- Have Adequate & Appropriate Funding
- “Be Committed to Service to Others & Be Non-Profit”
- “Be Transparent & Accountable”
- “Adapt & Respond to Change”
- “Be Cooperative & Collaborative”
- “Be Competent, Reliable & Credible.”¹¹²

To be cooperative and collaborative, DPOs need to work with people outside their immediate community, including government, the media, and other disability groups.¹¹³ There is evidence that the lack of cooperation between disability groups has reduced the effectiveness of the movement. Professor Samuel Bagenstos has argued that clarity and consensus are crucial to advance the anti-discrimination agenda.¹¹⁴ The diversity contained in the disability movement arguably fosters division. In the introduction to this Article, I raised the controversy of whether or not persons who use sign language should be regarded as disabled or a linguistic minority. This debate highlights the fact that persons with disabilities do not have homogenous concerns. The barriers confronting people who have different hearing acuities are not the same as persons in wheelchairs or who have no eyesight. In itself, this lack of homogeneity provides a richness of experience and should be regarded as a positive aspect of social diversity. In terms of advocacy, however, the lack of a single strategic focus can be problematic.

The problems caused by a lack of collaboration and a strategic unified approach can be evinced by United States Supreme Court disability rights litigation. When compared to women, racial minorities, and other equity groups, persons with disabilities have had less success when appearing before the U.S. Supreme Court.¹¹⁵ Stein, Waterstone,

¹¹² *Id.* at 193–213.

¹¹³ Performing a detailed primary analysis of DPOs to ascertain the potential for improvements is beyond the scope of this Article. Rather than focusing upon all the above characteristics, this Article will focus upon the need for DPOs to be cooperative and collaborative.

¹¹⁴ SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 11 (2009).

¹¹⁵ See Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1661 (2010) (reviewing SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)).

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and David Wilkins argue that one reason persons with disabilities have had such limited success in United States Supreme Court litigation is the lack of a strategic approach. They focus on the role of cause lawyers, “who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.”¹¹⁶ The number of disability rights cause lawyers is low when compared to the numbers in the feminist and race rights movements. In addition, many high profile disability rights cases have not been prosecuted by specialists working strategically to bring cases with high precedential value. While a number of cause lawyers are active in the lower appellate courts,¹¹⁷ their absence has resulted in negative consequences in cases before the United States Supreme Court. Stein, Waterstone, and Wilkins encourage DPOs to work together and develop a strategic focus to prosecute cases to high appellate courts that have good prospects of success and that have precedential value beyond the parties in the cases. Through taking strong cases to the United States Supreme Court, cause lawyers are more likely to have victories and develop a body of law that will empower persons with disabilities.

Although people with different disabilities confront different barriers, it is arguably possible to develop an overall unified strategic approach across DPOs. For example, people of all disability groups had a common interest concerning the United States Supreme Court’s definition of a disability under the ADA. Under the ADA, the definition of a disability is critical. Bagenstos explains that “[t]he disability definition serves a gatekeeping function in disability law. . . . [I]n regimes driven by the goals of civil rights and integration, the definition identifies the class of people entitled to reasonable accommodations and protections against discrimination.”¹¹⁸

In a series of judgments, the United States Supreme Court reinterpreted the definition of disability so that most persons with disabilities did not receive ADA protection. These judgments became

¹¹⁶ *Id.*

¹¹⁷ Examples of these cases include the following: an action brought by the National Federation of the Blind against Target because of web inaccessibility; a suit brought against Astrue by the American Council of the Blind because of a lack of alternative forms of communication in federal government services; a suit brought by Moeller due to physical access issues in Taco Bell restaurants; a suit brought against Shelley by the American Association of People with Disabilities over inaccessible voting procedures; a suit against the City of Sacramento brought by Barden over inaccessible sidewalks. *Id.* at 1682–85.

¹¹⁸ Samuel R. Bagenstos, *Comparative Disability Employment Law from an American Perspective*, 24 COMP. LAB. L. & POL’Y J. 649, 656 (2003).

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known as the Sutton Trilogy.¹¹⁹ The situation for persons with disabilities became problematic with the definition of disability being read so narrowly that most people who had impairments were denied protection. This resulted in people with epilepsy, multiple sclerosis, diabetes, cancer, and schizophrenia being found not disabled by lower courts for the purposes of the ADA.¹²⁰ The prospects for persons with disabilities in the United States at this point in time were grim. Lawmakers recognized the extent of the problems with the ADA, and in 2008, Congress reversed the negative impact caused by the Sutton Trilogy by enacting the Americans with Disabilities Amendment Act.¹²¹ The amendments to the ADA impact all disability rights groups and result in a largely unified policy response geared toward change, where possible disability rights movements should seek to find other areas of common interest and increasingly work together to maximize resources and political pressure.

IV. CONCLUSION

The CRPD has ushered in a new era of disability rights policy. Part II of this Article analyzed the significance in shifting to the human rights paradigm. Historically, laws and policies concerning persons with disabilities were made under the medical model. Laws and policies under this model regarded the person with a disability as requiring medical treatment or support to cope with his or her disability. The social model replaced the medical model. The social model argued that disabilities were not caused by a person having an impairment but by the barriers created in society. The social model required states to promote universal design principles and also required the removal of barriers to social inclusion. While the social model successfully removed many barriers, the social model failed to require states to ensure that persons with disabilities could exercise all of their human rights.

The new human rights paradigm addresses the limitations of the social model. The human rights paradigm requires states to embrace

¹¹⁹ The cases that constitute the Sutton Trilogy include *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). See Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 1003 n.47 (2008) (noting the holdings of the three cases); Lawrence D. Rosenthal, *Can't Stomach the Americans with Disabilities Act? How the Federal Courts Have Gutted Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other Hidden Illnesses*, 53 CATH. U. L. REV. 449, 459–61 (2004) (discussing the Court's rulings in the Trilogy).

¹²⁰ Chai R. Feldblum, Kevin Berry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192 (2008).

¹²¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

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universal design and also requires states to take various positive steps to ensure that all persons can exercise their human rights. This new, rights-based approach to laws and policies was adopted by the CRPD and was embraced by the United States when Congress ratified the CRPD in 2009. This Article has analyzed how disability rights advocates can utilize the CRPD to drive substantive changes. Leading scholars have identified four prongs to build on the momentum of change. First, states must be held accountable for variances between laws, policies, and rights contained in the CRPD. Second, DPOs need to advocate for law reforms. Third, DPOs need to embrace strategic litigation to develop case law. Finally, DPOs need to become more effective and build their capacity for advocacy.

Persons with disabilities have been discounted by society for centuries. The adoption of the human rights paradigm by the CRPD and the United States ratification of this convention have created a climate of change. The underlying model driving policies is now more accepting of persons with disabilities than at any other time in history. Through incremental steps, disability rights advocates can move to realize the hope that the CRPD represents and ensure that the world's largest minority group lives in a world where it can exercise its human rights.